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PRE-APPEAL BRIEF REQUEST FOR REVIEW		Docket Number (Optional) 016295.1453									
I certify that this communication is submitted to the U.S. Patent and Trademark Office (USPTO) through the Electronic Filing System (EFS) on the below date:  on <u>11-20-08</u>  Signature <u>Tracy Perez</u>  Typed or printed name <u>Tracy E. Perez</u>	Application Number 10/662,833		Filed 09/15/2003								
	First Named Inventor Jinsaku Masuyama et al.										
	Art Unit 2416	Examiner Adhami, Mohammad Sajid									
<p>Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request.</p> <p>This request is being filed with a notice of appeal.</p> <p>The review is requested for the reason(s) stated on the attached sheet(s). Note: No more than five (5) pages may be provided.</p> <p>I am the</p> <table border="0"><tr><td><input type="checkbox"/> applicant/inventor.</td><td><u>Brian K. Prewitt</u> Signature</td></tr><tr><td><input type="checkbox"/> assignee of record of the entire interest. See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed. (Form PTO/SB/96)</td><td>Brian Prewitt Typed or printed name</td></tr><tr><td><input checked="" type="checkbox"/> attorney or agent of record. Registration number <u>60,135</u></td><td>512.322.2684 Telephone number</td></tr><tr><td><input type="checkbox"/> attorney or agent acting under 37 CFR 1.34. Registration number if acting under 37 CFR 1.34 _____</td><td><u>November 20, 2008</u> Date</td></tr></table> <p>NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below*.</p> <p><input type="checkbox"/> *Total of _____ forms are submitted.</p>				<input type="checkbox"/> applicant/inventor.	<u>Brian K. Prewitt</u> Signature	<input type="checkbox"/> assignee of record of the entire interest. See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed. (Form PTO/SB/96)	Brian Prewitt Typed or printed name	<input checked="" type="checkbox"/> attorney or agent of record. Registration number <u>60,135</u>	512.322.2684 Telephone number	<input type="checkbox"/> attorney or agent acting under 37 CFR 1.34. Registration number if acting under 37 CFR 1.34 _____	<u>November 20, 2008</u> Date
<input type="checkbox"/> applicant/inventor.	<u>Brian K. Prewitt</u> Signature										
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<input type="checkbox"/> attorney or agent acting under 37 CFR 1.34. Registration number if acting under 37 CFR 1.34 _____	<u>November 20, 2008</u> Date										

This collection of information is required by 35 U.S.C. 132. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11, 1.14 and 41.6. This collection is estimated to take 12 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of:	Jinsaku Masuyama et al.
Serial No.:	10/662,833
Date Filed:	September 15, 2003
Group Art Unit:	2616
Confirmation No.:	1211
Examiner:	Adhami, Mohammad Sajid
Title:	<b>METHOD AND SYSTEM SUPPORTING REAL-TIME FAIL-OVER OF NETWORK SWITCHES</b>

**MAIL STOP – APPEAL**  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

Dear Sir:

**PRE-APPEAL REQUEST AND ARGUMENTS**

The following Pre-Appeal Brief Request for Review (“Request”) is being filed in accordance with the provisions set forth in the Official Gazette Notice of July 12, 2005 (“OG Notice”). At the time of the Final Office Action mailed September 3, 2008, Claims 2-11 and 13-20 were pending in this Application. Claims 2-11 and 13-20 were rejected. No claim amendments are hereby requested. Pursuant to the OG Notice, this Request is being filed concurrently with a Notice of Appeal. Applicants respectfully request reconsideration of the Application in light of the remarks set forth below.

### REMARKS

Applicants contend that the rejections of Claims 2-11 and 13-20 on prior art grounds contain clear legal and factual deficiencies, as described below. As of the time of the Final Office Action dated September 3, 2008, Claims 2-7, 10-11, 13-14, 16 and 19-20 stood rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 6,285,656 issued to Srinivas Chaganty et al. ("*Chaganty*") in view of U.S. Patent No 6,639,895 issued to Michael A. Helles et al. ("*Helles*"), Claim 8 stood rejected under 35 U.S.C. § 103(a) as being unpatentable over *Chaganty* in view of *Helles* as applied to claim 7 above, and further in view of U.S. Patent No. 6,381,218 issued to Michael S. McIntyre et al. ("*McIntyre*"), Claims 9, 15 and 17-18 stood rejected under 35 U.S.C. §103(a) as being unpatentable over *Chaganty* in view of *Helles* as applied to claims 7, 13 and 16 above, and further in view of U.S. Patent No. 6,032,194 issued to Silvano Gai et al. ("*Gai*"), and Claims 3, 7 and 13 stood rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 6,882,653 issued to Yoshinao Kiuchi et al. ("*Kiuchi*") in view of U.S. Patent Application Publication No. 2002/0176355 by Alan Mimms ("*Mimms*").

Applicants contend that the rejections of Claims 2-11 and 13-20 are not proper for the reasons described in Applicants' Responses dated October 17, 2008 at Pages 7-11 ("Applicants' Response"). In short, Applicants contend that, contrary to the Examiner's assertions, the cited references do not teach, either alone or in combination, each and every element of the recited claims.<sup>1</sup>

Applicants respectfully submit that *Chaganty* and *Helles*, either alone or in combination, fail to disclose each and every element of the Applicants' invention. For example, *Chaganty* and *Helles* fail to teach, disclose, or suggest communicating or monitoring a "link status of [a] switch-side port" and a system, apparatus or method "wherein [a] fail-over circuit [of a switch] automatically disables [a] server-side port [of the switch], in response to receiving a link status of down from [a] status circuit [of the switch]."

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<sup>1</sup> It is noted in the OG Notice at <http://www.uspto.gov/web/offices/com/sol/og/2005/week28/patbref.htm> that "Applicants are encouraged to refer to arguments already of record rather than repeating them in the request." Accordingly, Applicants refer here to, and summarize, the previous arguments rather than reciting them explicitly.

The Examiner argues that the limitation of communicating or monitoring a “link status of [a] switch-side port” as recited in Claims 3, 7, and 13 are disclosed by *Chaganty* as follows:

*Chaganty* further discloses *a status circuit in the first switch in communicating link status of the switch-side port to a fail-over circuit* (Col. 8 lines 38-39 Flow switch continues to monitor status signals and status signal requests where the status circuit and fail-over circuit are part of the switch).

(Final Office Action, Pages 3, 6, 7).

The portion of *Chaganty* cited by the Examiner merely states “Flow switch 105 continues to monitor status signals and status signal requests.” (Col. 8, lines 38-39). However, as argued by the Applicants in their many of their previous responses, neither this portion of *Chaganty* nor any other part of *Chaganty* contemplates that the monitored status signals relate to a “link status of [a] switch-side port” as recited in Claims 3, 7, and 13. Instead, *Chaganty* contemplates the monitoring of status signals across a failover link connecting active and passive switches. (Col. 3, Lines 8-11; Col. 4, Lines 1-2). The cited reference does not teach any fail-over system or method in which the switch-side ports, to which Y-cables 145 and 150 are attached leading to routers 175 and 180, are monitored. (Col. 2, Lines 61-65. *See also* Fig. 1). Accordingly, the monitoring of status signals on the failover link as contemplated in *Chaganty* is distinct from the communication and monitoring of link status of the switch-side port recited in Claims 3, 7 and 13. The Examiner’s rejection also fails because *Chaganty* fails to disclose the monitoring of a link status of a switch-side port as inherent or necessarily present. For Applicants’ arguments addressing the Examiner’s improper attempt to rely on inherency, see Applicants’ Response at Pages 8-9.

Despite these repeated arguments by the Applicants, the Examiner has yet to respond to these points raised by the Applicants.

The Examiner also alleges that *Helles* discloses “a switch disabling a port based on receiving a link status of down from a status circuit on the switch and monitoring a port,” relying on Fig. 2 and Columns 4 and 5 of *Helles*. (Final Office Action, Pages 4, 6, 7). The Applicants have responded to this allegation at great length, and do not repeat such response here. (See, e.g., Applicants’ Response 9-10). Despite such Applicants’ arguments, the Examiner states in the Advisory Action that “In *Helles*, the fault signal relates to the status of the port.” Again, as stated in Applicants’ Response, the Examiner has failed to identify how

the fault signal described in *Helles* is at all related to a status of a port. Rather than actually responding to the Applicants' arguments, the Examiner has merely restated his own.

In addition, the Examiner makes the conclusory statement that "It would have been obvious to one of ordinary skill in the art at the time of the invention to modify Chananty to include a switch disabling a port based on receiving a link status of down from a status circuit on the switch as taught by *Helles* in order to quickly recover from a failure and prevent data loss of delay." The Applicant notes that no evidence in the prior art of record, or any other evidence or record supports the proposition that this reason alone is sufficient reason to combine the references.

The Examiner's statements are not sufficient to support a finding of obviousness because "[t]he key to supporting any rejection under 35 U.S.C. [§] 103 is the *clear articulation of the reason(s) why the claimed invention would have been obvious*." M.P.E.P. § 2143 (emphasis added). The M.P.E.P. also states that "the analysis supporting a rejection under 35 U.S.C. [§] 103 should be *made explicit*. *Id.* (emphasis added). M.P.E.P. § 2143 also sets forth a host of exemplary rationales and Examiner may employ in maintaining a rejection, including particular findings of fact required to support each such rationale. In the present case, the Examiner has not made any such rationale explicit, has not supported the rejection using any rationale set forth in M.P.E.P. § 2143 or other suitable rationale, and has not made any factual findings to support any such rationale. Applicants refer to their arguments set forth in Applicants' Response at Pages 10-11, as well as M.P.E.P., for the proper rationales for a determination of obviousness, as well as the factual findings necessary to support such rationales.

The Examiner has failed to assert any of these rationales or make any of these necessary findings, perhaps because there is no documentary evidence of record in the present application to make such a finding. The Examiner is respectfully reminded that, just as in a court case, any factual findings must be supported by documentary evidence *in the record*. 37 C.F.R. § 1.104(c)(2); M.P.E.P. § 2144.03(C). The Examiner is also respectfully reminded that if the Examiner relies on personal knowledge to support a finding of what is known in the art, such finding must be supported with an affidavit or declaration setting forth specific factual statements and explanation to support the finding. 37 C.F.R. § 1.104(d)(2); M.P.E.P. § 2144.03(C).

For at least the reasons set forth above, the determination of obviousness is improper, and the Applicants respectfully request withdrawal of the rejections and allowance of Claims 2-11 and 13-20.

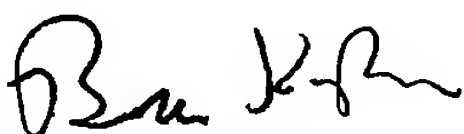
### CONCLUSION

Applicants submit these Arguments in Support of Pre-Appeal Brief Request for Review along with a Notice of Appeal. Applicants authorize the Commissioner to charge Deposit Account No. 50-2148 in the amount of \$540.00 for the Notice of Appeal.

Applicants believe there are no further fees due at this time, however, the Commissioner is hereby authorized to charge any additional fees necessary or credit any overpayments to Deposit Account No. 50-2148 of Baker Botts L.L.P.

If there are any matters concerning this Application that may be cleared up in a telephone conversation, please contact Applicants' attorney at 512.322.2684.

Respectfully submitted,  
BAKER BOTTS L.L.P.  
Attorney for Applicants

  
Brian K. Prewitt  
Reg. No. 60,135

Date: November 20, 2009

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